IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

CALEB A.C. SMITH
Airman (E-2), USAF
Appellant.

Crim. App. No. 40013

USCA Dkt. No. 22-0237/AF

BRIEF ON BEHALF OF APPELLANT

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II. WHETHER THE EVIDENCE WAS LEGALLY INSUFFICIENT BECAUSE THE ALLEGED VICTIM WAS CAPABLE OF CONSENTING AND WHERE, EVEN IF SHE WAS NOT CAPABLE OF CONSENTING, AMN SMITH REASONABLY BELIEVED THAT SHE DID CONSENT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction over this matter under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2019). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2019).

Statement of the Case

On September 4, 2020, Airman (Amn) Caleb Smith (E-2) was convicted, contrary to his pleas, by a general court-martial composed of a panel of officer members at Shaw Air Force Base, South Carolina, of one specification of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2019). (JA at 466). Amn Smith was sentenced to a reprimand, to be reduced to the grade of E-1, to

forfeit all pay and allowances, to be confined for 60 days, and to be dishonorably discharged from the service. (JA at 468). On September 23, 2020, the Convening Authority disapproved the adjudged reprimand. (JA at 022). The Convening Authority took no other action on the findings or sentence, and judgment was entered on October 13, 2020. (*Id.*)

On May 25, 2022, the Air Force Court affirmed the findings and the sentence. (JA at 19).

Statement of Facts

The alleged victim, Senior Airman (SrA) H.S., and Amn Smith met and became friends in the summer of 2018. (JA at 42). They were both 22 years old. (JA at 50, 499). While awaiting their initial training, they worked together daily and hung out four to five times a week that summer. (JA at 43-33). They also played games, such as "Dungeons & Dragons," with their circle of friends at least once a week. (JA at 44). At that time, SrA H.S. was in a long-distance relationship with a Marine (JA at 47), and as far as she could tell, Amn Smith had not shown interest in her romantically. (JA at 43-44).

SrA H.S. was an experienced drinker who started before reaching the legal age of 21 and often drank to excess in social situations. (JA at 126-27). She drank heavily at the group's Dungeons and Dragons games, often drinking a bottle of wine by herself and sometimes even two bottles. (JA at 127). Some witnesses

who had observed her drink heavily—such as when she consumed "pitchers" of beer—reported that she could do so without stumbling or slurring her speech. (JA at 169).

In November 2018, SrA H.S. invited a few friends, including Amn Smith, to see one of her favorite bands at a venue in Charlotte, NC. (JA at 46). Amn Smith was the only one that accepted the invitation. (JA at 48). Because they were friends, SrA H.S. knew Amn Smith was a peaceful person who had never behaved aggressively. (JA at 125).

The drive to Charlotte was about two and a half hours. (JA at 48). SrA H.S. packed an overnight bag and made a hotel reservation for one room with two beds to share with Amn Smith. (JA at 48-49). On November 16, 2018, SrA H.S. and Amn Smith left Fort Gordon and drove straight to the concert venue in Charlotte, arriving around 1830 hours. (JA at 50).

Soon after, SrA H.S. purchased and consumed a vodka cranberry drink. (JA at 51, 130). Amn Smith also ordered a drink, but SrA H.S. could not recall what kind. (JA at 51). The venue was crowded, and the lines at the bar were long. (*Id.*). But SrA H.S. and Amn Smith had found a place to stand near the stage. (JA at 52). Because of the long lines, they alternated standing in line at the bar for drinks. (*Id.*). While she waited, SrA H.S. listened, danced, and drank. (JA at 53). SrA H.S. acknowledged that she becomes more social and talkative when she

drinks. (JA at 130). She recalled having three drinks that evening. (JA at 132). She described the drinks as "very strong." (JA at 52). In an interview with AFOSI, Amn Smith said SrA H.S. might have had one to two more drinks. (JA at 286).

After the first band finished, at around 2100 hours, the pair walked to the merchandise table. (JA at 53). SrA H.S. talked to the band and looked at their merchandise. (*Id.*). On direct examination, SrA H.S. testified that this was when her memory became "hazy." (JA at 54). She reported no memories between the merchandise table and the hotel room. (JA at 55).

SrA H.S. testified that her next memory was in the hotel room. (JA at 65). By her account, she had the presence of mind to "claim" the bed closest to the door. (*Id.*). She knew it was closest to the air conditioner – which is why she claimed the bed. (JA at 153). She was also able to recall that she was fully dressed (JA at 56) and wearing "skinny jeans" that were difficult to take off. (JA at 139). According to SrA H.S., her claiming of the bed was her last meaningful memory until she awoke the next morning. (JA at 56).

SrA H.S. had blacked out before. (JA at 128). She had once even blacked out and failed to remember a bar with dueling pianos. (*Id.*). She believed the alcohol may have interfered with the prescription medication she had taken earlier

in the day. (JA at 129). Still, she denied that the medication exacerbated the effects of the alcohol. (*Id.*).

The next morning, SrA H.S. woke up in the other bed—not the one she had claimed—next to Amn Smith, completely undressed and facing the wall. (JA at 56). Amn Smith had his arm around her. (*Id.*). She woke up and quickly went into the bathroom. (JA at 30). Her vaginal area felt sore, and she shrugged off the faint blood from when she wiped after urinating. (JA at 57, 142). She attributed the vaginal soreness to her clothes chafing. (JA at 142). SrA H.S. eventually found her underwear ripped and underneath the covers at the foot of the bed closest to the door – the bed she first "claim[ed]." (JA at 57-58). SrA H.S. attested that there were no signs of urination on her body, underwear, jeans or sheets. (JA at 145-47).

SrA H.S. did not remember where her car was parked. (JA at 59). After talking with Amn Smith (who remained at the hotel), she left the hotel alone and found her car parked across the street from the venue. (*Id.*). She did not drive away or call a friend. Instead, she returned to the hotel and picked up Amn Smith and her belongings to begin the several-hour drive home. (JA at 63-64).

After SrA H.S. retrieved her car, Amn Smith and SrA H.S. went to breakfast in Charlotte. (JA at 64). After breakfast, they went to a "cat café" for coffee. (JA

at 65). There, SrA H.S. asked Amn Smith why her underwear was ripped. (*Id.*). Amn Smith said he did not know. (*Id.*).

They next went to a gas station. (JA at 66). Before returning to Fort Gordon, SrA H.S. asked why they were in bed together. (JA at 65). Amn Smith said it was because she "had urinated on the bed that [she] originally claimed." (*Id.*). While in the bathroom at the gas station, SrA H.S. noticed a suction mark on her neck. (JA at 66). She also saw bruises on her chest and arms. (JA at 67). While in the bathroom, she texted her friend, Amn M.H., "I think he raped me."[1] (JA at 103, 480). She sent that text several hours after waking up next to Amn Smith. (JA at 87). SrA H.S. did not "know how [she was] going to tell [D.] [her boyfriend]." (JA at 104).

After sending this text, SrA H.S. did not immediately call the authorities or seek to escape Amn Smith's company; instead, she rejoined him in her car, and they listened to podcasts and music the rest of the ride home. (JA at 105). Later, on the advice of a friend who was a victim advocate, SrA H.S. completed a SAFE kit. (JA at 112, 484-98).

Amn Smith voluntarily participated in two interviews with Air Force Office of Special Investigations (AFOSI) agents. (JA at 253-390). He described the night

[1] While this brief refers to these messages by the generic term "text messages," they were sent via a messaging application: Snapchat.

of the concert. (JA at 273). He talked about arriving at the hotel and stumbling through the door with help from the taxi driver. (*Id.*). In the room, SrA H.S. and Amn Smith began making out. (JA at 326). Amn Smith described how he had trouble removing her bra. (*Id.*). So she removed her own bra, and he ripped off her underwear. (*Id.*). She then urinated a little, and Amn Smith wiped her up. (JA at 327). They continued making out and rolling around on the bed. (*Id.*). Amn Smith began to perform oral sex on SrA H.S. (*Id.*). She climbed on top of him and began grinding her hips on his stomach. (JA. at 332). Amn Smith pushed her off. (JA at 327). They did not have penetrative sex. (*Id.*).

Amn Smith only performed oral sex on SrA H.S. for a moment before she slipped off the bed. (JA at 329). He did not remember using his fingers. (JA at 330). He described the events as passionate, with SrA H.S. an active participant. (*Id.*). Amn Smith also offered to take a polygraph to prove he was telling the truth, but AFOSI declined to pursue this option. (JA at 389).

At trial, Government counsel began his opening statement with a quote from SrA H.S.'s text: "I think he raped me." (JA at 23-24). The Government also began and ended its closing argument with this evidence. (JA at 412-13, 451). The Government presented a slideshow during their closing argument (JA at 512-52); the first slide with content displayed the "I think he raped me" text message

against an all-black background. (JA at 512). The following slide contained more text messages from this same thread. (JA at 513).

The Air Force Court Decision

1. Excited Utterance.

On appeal, Amn Smith challenged the military judge's admission—over Defense objection—of the Snapchat message "I think he raped me" that SrA H.S. sent to a friend the morning after the concert. (JA at 553). The Air Force court found that the military judge did not abuse his discretion in admitting the "I think he raped me" Snapchat message SrA H.S. sent to a friend the morning after the concert. (JA at 12). The Air Force court pointed to SrA H.S.'s testimony that, at the time she sent the text message, she was experiencing "sweating, shakiness and nausea brought on by seeing the bruising on her body and making the connection to what occurred at the hotel." (JA at 13). The Air Force court concluded that these symptoms showed that SrA H.S. was under the stress of a startling event at the time of the texts. (JA at 14-15). The Air Force court further disagreed with Amn Smith's contentions that the witness must remember the events in question for an excited utterance to be admissible and that too much time had passed between the purportedly startling event and her statement. (JA at 15). It instead found that SrA H.S.'s statement, "I think he raped me," was not a statement of fact but a "spontaneous belief or opinion" made under physical and emotional stress.

(*Id.*). As support for this finding, it cited SrA H.S.'s "seeing hickeys and bruises" along with the torn underwear, blood, and bruising to her genitals, concluding that SrA H.S. was "putting all the pieces together in her mind" at the time. (*Id.*).

2. Consent or Mistake of Fact as to Consent

In its factual and legal sufficiency review, the Air Force court concluded that the Government had proved that SrA H.S. could not consent to sexual activity on the night in question. (JA at 9-10). It found persuasive SrA H.S.'s testimony that she had no memory between getting to the hotel with Amn Smith and waking up the following morning, as well as Amn Smith's statement to AFOSI that SrA H.S. was having trouble standing up while at the concert they attended. (JA at 10). It also pointed to Amn Smith's statement that SrA H.S. could not walk to the hotel room by herself and "peed herself twice" in the hotel room. (*Id.*).

The Air Force Court found mistake of fact not to be "in issue" because the third element of the offense required the Government to prove that Amn Smith should have known SrA H.S. was too impaired to consent. (*Id.*). In the lower court's view, the element requiring that the accused "knew or reasonably should have known" the victim could not consent (Element 3) subsumes the defense of mistake of fact as to consent. (*Id.*). The Air Force Court concluded that because it found that the Government had proved the third element of the offense, Amn Smith knew or reasonably should have known SrA H.S. could not consent. (JA at

10-11). It relied on his statements to the effect that he knew SrA H.S. was drunk and that it was "a wrong idea to have sex with her since she was drunk, and I was scared that I would get in trouble for it." (JA at 11).

Summary of Argument

1. Excited Utterance

SrA H.S.'s hearsay statement of "I think he raped me" was not an excited utterance because it referred to an event she had no memory of. Instead, it derived from "reflection and deliberation" and therefore fails the first prong of the *Arnold* test. *See United States v. Arnold*, 25 M.J. 129, 132 (C.M.A. 1987). SrA H.S. explicitly acknowledged reflection and deliberation before sending the text message. (JA at 87). Both the Government at trial and the Air Force court explicitly acknowledged as much. The Government described her thought process as "*piecing together* that she believed that she had been sexually assaulted." (JA at 75) (emphasis added); (JA at 412-13). The Air Force Court echoed this language, concluding that SrA H.S. was "putting all the pieces together in her mind" when she made the out-of-court statement. (JA at 15, 412). These statements are an explicit acknowledgment of reflection and deliberation, in violation of the first prong of the *Arnold* test. As SrA H.S. had no memory of the alleged assault, the statement she made the morning after *had to* have been the product of reflection and deliberation. This evidence fails the first prong of the *Arnold* test.

The statement also fails the third prong of the *Arnold* test, as SrA H.S. was not under the stress of the startling event at the time. The statement was made several hours after SrA H.S. woke up, during which she had calmly engaged in several complex activities such as locating and retrieving her car, driving for several hours, stopping for breakfast, and then stopping for coffee at a "cat cafe." Even more time (the entire night) had passed between the sexual encounter and the statement. SrA H.S. was an adult at the time of the alleged assault. She could drive and was otherwise composed on the morning of the texts and had multiple opportunities to leave without Amn Smith.

Compounding the error, SrA H.S. was not a competent witness to testify to the ultimate issue of whether a sexual assault occurred because she had no memory of the events at issue. Merely calling it an excited utterance cannot transform this otherwise inadmissible statement into an admissible one.

The error prejudiced Amn Smith because, without the statement "I think he raped me," the only evidence would consist of (1) an alleged victim with no memory; and (2) Amn Smith's testimony that consensual sexual conduct had occurred. The Government needed something more, and it found it in the statement, "I think he raped me." The Government made this statement *the central theme* of their case, and used it as a proxy for the ultimate issue of guilt.

2. Legal Sufficiency

The evidence was legally insufficient because (1) SrA H.S.'s own testimony established that she could make decisions, understand her surroundings, and knew what was going on; and (2) the *only* evidence presented about the sexual act itself (Amn Smith's statements to AFOSI) showed that SrA H.S. was moving under her own power, deciding on sexual activity, and was an enthusiastic participant. Amn Smith's statements as to the elements at issue—SrA H.S.'s capacity to consent and his perception of it—were consistent with the bulk of the evidence in this case, including SrA H.S.'s statements.

While failing to discuss uncontested evidence that SrA H.S. demonstrated executive function in the relevant timeframe, the Air Force court emphasized that she could not remember much of the evening. (JA at 9). In so doing, the Air Force court wrongly equated "blacking out"—an inability to form new memories—with incapacity to consent. These are two different things.

Argument

I. THE MILITARY JUDGE ERRED IN ADMITTING TEXT MESSAGES AND TESTIMONY AS AN EXCITED UTTERANCE RELATED TO THE ALLEGED VICTIM'S BELIEF THAT SHE WAS RAPED WHERE SHE HAD NO MEMORY OF THE EVENTS IN QUESTION.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for abuse of discretion. *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2020); *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017). A military judge abuses his discretion when: (1) "his findings of fact are clearly erroneous," (2) "the military judge's decision is influenced by an erroneous view of the law," or (3) when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).

In determining prejudice arising from non-constitutional evidentiary errors, this Court weighs: "(1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Law

Military Rule of Evidence (Mil. R. Evid.) 802 states the general prohibition against the admission of hearsay. Mil. R. Evid. 801(c) defines hearsay as: "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Mil. R. Evid. 803(2), the excited utterance exception to the rule prohibiting hearsay, permits the admission of: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement cause[d] by the event or condition."

Though not necessarily supported by science, courts have found that the fundamental principle of the excited utterance exception is that a declarant's ability to shade the truth is temporarily suspended after a startling event. *See United States v. Keatts*, 20 M.J. 960 (A.C.M.R. 1985). "The crucial point is that the court must be able to find that the declarant's state at the time he made the declaration ruled out the possibility of conscious thought." *See also* J. Weinstein & M. Berger, *Weinstein's Evidence* 803–91 (1984) (footnote omitted.)

The theory underlying the admission of an excited utterance is "that persons are less likely to have concocted an untruthful statement when they are responding to the sudden stimulus of a 'startling event.'" *United States v. Lemere*, 22 M.J. 61, 68 (C.M.A. 1986). The implicit logical premise for admission of an excited

utterance is "that a person who reacts 'to a startling event or condition' while 'under the stress of excitement caused' thereby will speak truthfully because of a lack of opportunity to fabricate." *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990).

In *United States v. Arnold*, this Court's predecessor articulated a three-prong test for a statement to qualify as an excited utterance: (1) the statement must be spontaneous, excited, or impulsive rather than the product of reflection and deliberation; (2) the event prompting the utterance must be startling, and (3) the declarant must be under the stress of excitement caused by the event. 25 M.J. 129, 132 (C.M.A. 1987). The Court of Military Appeals also established that the excited utterance exception to the hearsay rule was limited to statements made when responding to the sudden stimulus of a startling event. *Lemere*, 22 M.J. at 68.

This Court applies a strong presumption against admissibility where a proffered excited utterance does not immediately follow the startling event. *United States v. Abdirahman*, 66 M.J. 668, 676 (C.A.A.F. 2008) (referencing *United States v. Donaldson*, 58 M.J. 477, 484 (C.A.A.F. 2003) (citing *United States v. Jones*, 30 M.J. 127, 129 (C.M.A. 1990)).

While courts are often more tolerant of excited utterances made by children hours or days after the startling event, they are less flexible where adults are involved. *See Donaldson*, 58 M.J. at 484 (finding statement by a three-year-old to

their mother 12 hours after alleged assault was an excited utterance); *United States v. Pearson,* 33 M.J. 913, 915 (C.M.A. 1991) (statement of 6-year-old boy to his mother made three hours after alleged assault was admissible); *Arnold*, 25 M.J. at 132 (statement of 16-year-old rape victim held admissible despite at least a 12-hour lapse between the alleged rape and the statement); *United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir.1993) (admitting statements of five-year-old though one statement was made two hours after the alleged assault and the other at least 12 hours after the alleged assault); *Morgan v. Foretich,* 846 F.2d 941, 947 (10th Cir. 1993) (finding that a four-year-old's three-hour lapse in reporting an alleged assault was "well within the bounds of reasonableness" for an excited utterance); *Gross v. Greer,* 773 F.2d 116, 119–20 (7th Cir.1985) (holding that a lower court properly admitted a four-year-old's hearsay statement although she made it 12-15 hours after the startling event); *compare United States v. Marrowbone,* 211 F.3d 452, 455 (8th Cir. 2000) (out of court statements made by an older teenager three hours after assault were not excited utterances); *Jones,* 30 M.J. at 129-130 (statement made by adult witness to assault 12-15 hours after assault was not admissible as excited utterance).

Analysis

The military judge abused his discretion by admitting SrA H.S.'s statements under Mil. R. Evid. 803(2).[2] This Court should find error under the *Arnold* test's first and third prongs.

While the standard of review is abuse of discretion, this Court should accord reduced deference to the military judge's ruling because of the lack of analysis placed on the record by the military judge. When a military judge does not make clear rulings on the record, his rulings are entitled to less deference. *United States v. Finch*, 79 M.J. 389, 397 (C.A.A.F. 2020). "If the military judge fails to place his findings and analysis on the record, less deference will be accorded." *United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014). The judge made no findings of fact and did not explain his ruling other than to state he believed the foundation had been laid. (JA at 90).

[2] Along with the statement "I think he raped me," the military judge also admitted several more text messages from the same conversation as excited utterances, primarily about SrA H.S. noticing injuries on her body. (JA at 480-83). These messages are additionally problematic, because they were sent in response to questions from Amn M.H., the other participant in the text message conversation. (*Id.*); *See* Stephen A. Saltzburg et al., Military Rules of Evidence Manual § 803.02[4][a] at 8-92 (7th ed. 2011) ("There may be reason for skepticism about spontaneity when a declarant's statements are in response to questioning.").

1. Arnold Test: Prong One

As SrA H.S. had no memory of allegedly being assaulted, the statement that she believed she was raped *had to be* "the product of reflection and deliberation" and fails right out of the gate. *Arnold*, 25 M.J. at 132. In other words, she could not have believed that she was raped without first reflecting and deliberating on the little she could remember of the events of the previous night paired with what she noticed the morning after, which she had been doing since she woke up nude next to Amn Smith that morning. In a situation like this, where the declarant lacks any memory of the actual event, her conclusions about the event are, by definition, a product of reflection. They certainly are not a product of memory. The conclusion was a deduction based on observations made throughout the morning and the assumptions she made about how she would act sober.

SrA H.S.'s answers on this issue during the Article 39a session confirmed this. She agreed that she was "taking these observations," "putting them all together," "[a]nd then drawing a conclusion to as to something that [she] had no memory of." (JA at 87). Even the Government described her thought process as "*piecing together* that she believed that she had been sexually assaulted." (JA at 75) (emphasis added). And in closing argument, the trial counsel argued to the panel that "the evidence before you shows that the realization that [SrA H.S.] came to reach in that bathroom is that he sexually assaulted her and that he is guilty."

(JA at 413). The Air Force Court used similar language, concluding that SrA H.S. was "putting all the pieces together in her mind" when she made the out-of-court statement. (JA at 15, 412). These are explicit acknowledgments of reflection and deliberation, in direct violation of the first prong of the *Arnold* test.

Relatedly, the concept of memory is interwoven with the rationale behind the excited utterance exception. As the Supreme Court of Ohio has said of excited utterances:

> Reactive excited statements are considered more trustworthy than hearsay generally on the dual grounds that, first, the stimulus renders the declarant incapable of fabrication and, second, *the impression on the declarant's memory at the time of the statement is still fresh and intense*. Accordingly, Rule 803(2) assumes that excited utterances are not flawed by lapses of memory or risks of insincerity.

State v. Taylor, 66 Ohio St. 3d 295, 300 (1993) (emphasis added) (citing Louisell & Mueller, Federal Evidence (1980) 491–492, Section 439) (additional citation omitted).[3] By definition, this rationale cannot be satisfied when the declarant has no memory of the event.

This evidence fails the first prong of the *Arnold* test, and this failure resolves admissibility.

2. Arnold Test: Prong Three

While the first prong is dispositive, the hearsay statement at issue also fails

[3] As the excited utterance exception is common across U.S. jurisdictions, this Court may look beyond military precedent for persuasive insight.

the third prong of the *Arnold* test, as SrA H.S. was not under the stress of the startling event at the time of sending these text messages. Military courts have looked to several factors to decide whether a declarant was under the stress of a startling event at the time of a statement, including "the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement." *Donaldson*, 58 M.J. at 483 (quoting *Reed v. Thalacker*, 198 F.3d 1058, 1061 (8th Cir. 1999)). The lapse of time is an essential factor. *Id.* at 483 ("As a general proposition, where a statement relating to a startling event does not immediately follow that event, there is a strong presumption against admissibility under M.R.E. 803(2).").

These factors align against the admission of SrA H.S.'s texts to Amn M.H. As discussed above, several hours had passed between when SrA H.S. woke up in Amn Smith's bed and when she texted Amn M.H. from the gas station bathroom, during which she and Amn Smith had stopped for both breakfast and then coffee at a "cat cafe." Even more time (the entire night) had passed between the sexual encounter and her statements. SrA H.S. was an adult at the time of the alleged assault. She could drive and was otherwise composed on the morning of the texts. (JA at 58-59). She had multiple opportunities to leave without Amn Smith – after

leaving the hotel to get her car, and after making multiple stops during the morning with him. (JA at 63-65). She also felt safe enough to continue driving home with Amn Smith right after allegedly beginning to suspect he had raped her. (JA at 112). Directly after the statement at issue, she got back into her car with her alleged assailant and drove home with him while listening to podcasts and music—a time during which she described the mood in the car as "awkward," but not frightening. (JA at 108).

The lapse in time and SrA H.S.'s composure over the course of the morning show that her statement was not made while under the stress of the startling event. Such a statement cannot and should not be admissible under the excited utterance exception.

3. Competency of Evidence

Part of why the statement "I think he raped me" does not fit neatly into the excited utterance exception is because this speculative statement—going to the ultimate issue before the factfinder—was not a proper subject for testimony in the first place. Whether via in-court testimony, or out-of-court hearsay, SrA H.S. was not a competent witness to testify to the ultimate issue of whether a sexual assault had occurred because she had no memory of the events at issue. SrA H.S. was only competent to testify to factual events she experienced, observed, and remembered. Merely calling it an "excited utterance" cannot transform this

otherwise inadmissible statement into an admissible one. The excited utterance exception is not a panacea for admitting otherwise inadmissible evidence.

In this regard, SrA H.S.'s competency (or lack thereof) left the Government with a dilemma. SrA H.S. had no memory of the events in question. And the only other evidence available about these events was Amn Smith's statement that all sexual activity had been consensual, mutual, and participatory.[4] So, the Government had "smoke but no fire": suspicion but no accusation. By convincing the military judge to improperly admit the statement "I think he raped me" as an excited utterance, the Government found a proxy for an evidentiarily competent accusation, and, as explored in the prejudice section below, leveraged it to the fullest.

4. <u>Prejudice</u>

The erroneous admission of this evidence prejudiced Amn Smith. The *only* competent evidence about the charged sexual activity was Amn Smith's statement that all sexual activity had been consensual, mutual, and participatory. SrA H.S., who endorsed no memory of the events in question, was not competent to provide testimony one way or the other as to her participation or real-time cognition.

As a result, without that evidence, the Government had no evidence of non-consent or inability to consent. They had evidence of intoxication, but that was not

[4] This dynamic is explored at greater length in the second granted issue.

enough. (JA at 604; *United States v. Dorr*, No. ARMY 20170172, 2019 WL 2240533 (A. Ct. Crim. App. May 22, 2019) (summ. disp.)) ("[L]ack of memory, however, does not equate with an inability to consent.") ("Article 120(b)(3) does not proscribe sexual acts with impaired people, but rather with people incapable of consenting to the conduct at issue because of their impairment – and even then, only when the inability to consent is known, or reasonably should be known, to the accused.").

If the panel accepted Amn Smith's version of events, it would have led to an acquittal because he described SrA H.S. as intoxicated but participating and consenting. The Government's narrow path to a conviction was to convince the panel to accept Amn Smith's statements that oral sex had taken place but reject his statements that SrA H.S. was an active participant and consented to sexual activity with him. Without a statement of non-consent by the victim, the Government could not thread this needle. The Government found what they needed in SrA H.S.'s statement, "I think he raped me." It was the missing accusation they needed. And the Government leveraged it to the fullest. The Government made this evidence *the central theme* of their case.

As this Court has recently stated, the materiality and quality of evidence to the Government's case may be illustrated by the Government's use of that evidence. *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F. 2022). In this

case, the Government's use of the evidence illustrate that it was *the central theme* of the prosecution case. The Government began its opening statement with SrA H.S. in the gas station bathroom, dedicating the first several minutes exclusively to this evidence and concluding with the payoff: "I think he raped me." (JA at 23-24). The Government returned to the gas station bathroom and the "I think he raped me" text moments later. (JA at 26-27). The Government similarly began its closing argument with this same theme, again dedicating the first two paragraphs exclusively to this evidence and concluding: "the evidence before you shows that the realization that [SrA H.S.] came to reach in that bathroom is that he sexually assaulted her and that he is guilty." (JA at 412-13). The Government returned to this theme shortly after that. (JA at 417).

The Government concluded its closing argument with this theme, directly encouraging the panel to do what SrA H.S. did in the gas station bathroom: piece together evidence of their night together contrasted with her lack of memory and make the illogical leap that Amn Smith was guilty. (JA at 1071.) ("It's what [SrA. H.S.] was doing that day in front of the mirror. You piece it all together and you come to the realization that he sexually assaulted her that night, and he is guilty as charged. Thank you."). (*Id.*). In all three instances, the Government explicitly argued that SrA H.S.'s speculative conclusion, "I think he raped me," was correct and that the panel should adopt the same conclusion she did on the ultimate issue

of guilt. (JA at 412-13, 417, 451). The Government presented a slideshow during their closing argument. (JA at 512-52). Once again, the Government started with this evidence. The first slide with content displayed only one thing: the "I think he raped me" text message against an all-black background. (JA at 512). The following slide contained more text messages from this same thread. This evidence was the central theme of the Government's case.[5]

Placed in the terms of the *Kohlbek* test, the materiality and quality of this evidence was high, as shown by the Government's near-constant invocation of it. SrA H.S.'s statement filled an otherwise fatal gap in the Government's case. From its opening statement to the concluding line of its closing argument, the Government heavily relied on the statement, "I think he raped me." As a result, the third and fourth prongs of the *Kohlbek* test support a finding of prejudice.

Concerning the first and second prongs of the *Kohlbek* test, examining the strength of the parties' cases, these factors also strongly support a finding of prejudice.[6] As examined in the following section, the evidence on the critical legal question (capacity to consent) had severe deficiencies. The *only* competent

[5] While the focus here is on the merits, the Government also started their sentencing argument with it, which emphasizes how much they used this evidence as the central theme of their case. (JA at 478).

[6] These two factors can be examined together because here, as is often the case, the strength of the Defense case was largely tied to the weakness in the Government case.

evidence about the charged act was that SrA H.S. both could and *did* consent. There is also a synergy between the prongs because the effectiveness of that evidence (third and fourth prongs) went precisely to the subject where the Government's evidence was weakest (first and second prongs).

Conclusion: Issue I

Allowing a statement like "I think he raped me," made after deliberation and reflection over an entire morning, into evidence as an excited utterance would represent a significant expansion of the exception. This Court should maintain and reinforce its existing precedent, which this evidence fails. This Court should find error and prejudice.

WHEREFORE, this Honorable Court should reverse the Air Force Court's decision and set aside the findings and the sentence.

II. THE EVIDENCE WAS LEGALLY INSUFFICIENT BECAUSE THE NAMED VICTIM COULD CONSENT, AND EVEN IF SHE COULD NOT HAVE CONSENTED, AMN SMITH REASONABLY BELIEVED THAT SHE DID CONSENT.

Standard of Review

The legal sufficiency of evidence is reviewed de novo. *United States v. Robinson*, 77 M.J. 294, 297 (C.A.A.F. 2018) (citing *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law

The test for legal sufficiency is "whether, considering the evidence in a light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003); *United States v. Pabon*, 42 M.J. 404, 405 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On review for legal sufficiency, every reasonable inference from the evidence must be drawn in favor of the prosecution. *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). Legal sufficiency review is limited to the evidence admitted at trial and exposed to the crucible of cross-examination. *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973); *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

This Court defined "incapable of consent" using the terms "competent," "incompetent," and "freely given agreement" in *United States v. Pease*. 75 M.J. 180, 184-185 (C.A.A.F. 2016). A competent person is "a person who possesses the physical and mental ability to consent." *Id.* An "incompetent" person is one "who lacks either the mental or physical ability to consent due to a cause enumerated in the statute." *Id.* at 183. A "freely given agreement" occurs when a person "first possess[es] the cognitive ability to appreciate the nature of the conduct in question, then possess[es] the mental and physical ability to make and to communicate a decision regarding that conduct to the other person." *Id.* Using

all three terms together, this Court endorsed the CCA's definition of "incapable of consenting" as "lack[ing] the cognitive ability to appreciate the sexual conduct in question or [lacking] the physical or mental ability to make or to communicate a decision about whether they agreed to the conduct." *Id.* at 185.

Analysis

To convict Amn Smith, the Government needed to prove, *among other things*, that (1) SrA H.S. could not consent to the charged act because she was impaired by alcohol; and (2) Amn Smith knew or reasonably should have known she was incapable of consenting due to impairment by alcohol. Similarly, Amn Smith raised the defense of mistake of fact as to consent, and the military judge instructed the panel that the Government had "the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist." (JA at 504).

While the panel need not have accepted Amn Smith's statements as 100% true, on this record, his statements were completely consistent with the bulk other evidence, including SrA H.S.'s testimony.

1. SrA H.S. Consented.

First, SrA H.S.'s testimony established that she could make decisions, understand her surroundings, and know what was going on in the relevant timeframe. SrA H.S. remembered being in the hotel room upon returning from the concert. (JA at 55). She had the presence of mind to "claim" the bed closest to the

door. (*Id.*). Demonstrating executive function, she also knew the bed was closest to the air conditioner – which is why she claimed it. (JA at 150). Additionally, SrA H.S. was wearing "skinny jeans" that were difficult to take off. (JA at 139). As a result, it's logical that she either took them off herself or helped Amn Smith remove them. This evidence established that, despite her intoxication, SrA H.S. possessed the mental and physical ability to make and act on decisions, and interact with her surroundings, in direct contravention of the *Pease* standard that such function must be lacking.

And the *only* evidence presented about the sexual act (Amn Smith's statements to AFOSI) supported a finding of not guilty rather than a finding of guilty. Amn Smith's statements were (1) that SrA H.S. affirmatively consented to and participated in the act; and (2) that he *perceived* SrA H.S. to have consented.[7] Amn Smith stated that SrA H.S. was "making out" with him, kissing him, and biting his lip (JA at 326-27, 330, 332, 334, 381-82); that she removed her own bra when he had trouble doing so (JA at 326-28, 330); that "she was on top of [him] and grinding on [him]" (JA at 327, 332, 386); that she was "coherent at this point" (JA at 327, 333); that "she gave as much as [he] gave" (JA at 381); that she

[7] There is substantial overlap between this evidence of actual consent and Amn Smith's perception of consent. Whether viewed considering the third element (Amn Smith's knowledge of incapacitation) or as a reasonable mistake of fact as to consent, if Amn Smith reasonably believed that SrA H.S. consented then he is not guilty.

seemed "into" the intimacy (JA at 328); that she was expressing that she was enjoying what was happening (JA at 328); that they were "in the heat of the moment" (JA at 328, 334); that it was "passionate" (JA at 328); that she stimulated and rubbed his penis with her hands (JA at 333, 336, 382); then, *when he stopped things*, she said, "'No, I want to keep going,'" "kept saying 'no,'" kept trying to grind her hips on him, and moped—apparently disappointed—after Amn Smith stopped the sexual activity, and kept kissing him (JA at 333, 385-87). In short, Amn Smith stated that SrA H.S. not only was capable of consenting, but actively did consent and participate.

SrA H.S.'s testimony showed that she could consent to sexual activity, while Amn Smith's statements showed that she did consent. Amn Smith also voluntarily participated in not one but two interviews with AFOSI (JA at 253-390) and was remarkably willing to provide corroborative evidence for his statements, agreeing to take a polygraph (JA at 342), provide DNA (JA at 343), allow a search of his phone (JA at 350-52), provide debit card transaction data for taxi charges (JA at 306, 355-59, 365), and even provide information on a former romantic partner at AFOSI's request (JA at 346-49).

2. Amn Smith Believed that SrA H.S. Consented.

In a substantially overlapping analysis, the evidence also shows that Amn Smith *believed* SrA H.S. had consented to sexual activity. He held this belief

because, *among other things*, she took off her own bra (JA at 326-28, 330), kissed him and bit his lip (JA at 326-27, 330, 332, 334, 381-82), was on top of him "grinding" on his stomach (JA at 327, 332, 386), seemed "into" the intimacy (JA at 328), rubbed his penis (JA at 333, 336, 382), and said "no" and acted upset when he called a halt to sexual activity (JA at 333, 385-87). Amn Smith perceived that she demonstrated both willingness to participate in sexual activity and the executive function to choose which bed to sleep in, take off her own clothing, and be upset when the sexual activity ceased. Accordingly, his belief that SrA H.S. had consented was honest and was a complete defense to the charged offense.

Again, Amn Smith's statements as to this issue were completely consistent with the bulk of the evidence in this case, including SrA H.S.'s statements.

3. SrA H.S. Did Not Remember the Sexual Acts.

While SrA H.S. had no memory of the sexual acts in question, a lack of memory while in a "blackout" state does not equate to an inability to consent. The Air Force Court found this evidence persuasive of incapacity: "[SrA] H.S.'s testimony that she had no recollection shortly after getting to the hotel is persuasive evidence that she was so intoxicated she was incapable of consenting." (JA at 9). In so doing, the Air Force Court wrongly equated "blacking out"—an inability to form new memories— with incapacity to consent. These are two different things. Military courts have found that a person experiencing a blackout can consent to sex.

See, e.g., *United States v. Pease*, 74 M.J. 763, 769 (N.M. Ct. Crim. App. 2015), *aff'd* by 75 M.J. 180 (C.A.A.F. 2016) (A person who blacks out cannot form new memories but is fully conscious, may engage with others around them, and may engage in consensual sex); *United States v. Lewis*, 2020 WL 3047524, at *8 (N.M. Ct. Crim. App. 2020) (unpub. op.) ("People do not know they are experiencing a blackout, and people interacting with others who are experiencing a blackout may be unaware that the other will later lack memory for events that took place.[…] They can still agree to have sex and participate in sexual acts. The mere fact that a person experiences a blackout does not mean that the person is unable to consent.") (JA at 615); *Dorr*, No. ARMY 20170172, 2019 WL 2240533) ("That lack of memory, however, does not equate with an inability to consent.") (JA at 604). Further, SrA H.S. had a history of blacking out when drinking alcohol, even during memorable activities such as dueling pianos at a bar she attended which she could not remember. (JA at 128). She also acknowledged she was an experienced drinker whose alcohol intake that night was not inconsistent with her prior drinking patterns. (JA at 126-28).

4. Mistake of Fact as to Consent Applies.

The Air Force Court found mistake of fact not to be "in issue" because the third element of the offense required the Government to prove that Amn Smith should have known SrA H.S. was too impaired to consent. (JA at 10). In the Air

Force court's view, the element requiring that the accused "knew or reasonably should have known" the victim was incapable of consenting (Element 3) subsumes the defense of mistake of fact as to consent. (*Id.*).

Several service courts have addressed this issue, but this Court has not settled it. *See, e.g.*, *United States v. Teague*, 75 M.J. 636, 638 (A. Ct. Crim. App. 2016) ("[I]f the [G]overnment proves that an accused should have reasonably known that a victim was incapable of consenting, the [G]overnment has also proven any belief of the accused that the victim consented was unreasonable."); *United States v. Rich*, 79 M.J. 572, 587 (A.F. Ct. Crim. App. 2019) (en banc) (citing *Teague*, 75 M.J. at 638) ("[B]y proving the elements of the charged offense, the Government necessarily disproved the existence of either asserted mistake of fact."), *aff'd on other grounds*, 79 M.J. 472 (C.A.A.F. 2020).

Under Article 120(f) of the UCMJ, "[a]n accused may raise any applicable defenses available under this chapter or the Rules for Court Martial (RCM)." A mistake of fact as to consent is an enumerated defense under RCM 916(j)(1). This Court should find that the defense of mistake of fact as to consent was available to Amn Smith under a plain reading of these authorities. It should also do so because it is the Government's burden to prove the elements of every offense. "To satisfy the due process requirements of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element of the charged offense." *United States v.*

Wilcox, 66 M.J. 442, 448 (C.A.A.F. 2008). The Government must also disprove affirmative defenses. R.C.M. 916(b)(1). To find that proving an element disproves a defense improperly lessens the Government's burden in proving its case.

Conclusion: Issue II

Based on the evidence presented by the Government at trial, a reasonable factfinder could not have found beyond a reasonable doubt that SrA H.S. could not consent or that Amn Smith knew or should have known that she could not consent.

WHEREFORE, this Honorable Court should reverse the Air Force Court's decision and set aside the findings and the sentence.

Conclusion

Without competent evidence to meet its burden, the Government presented proxy evidence of SrA H.S. hypothesizing that she would not have consented. The Government made the speculative statement, "I think he raped me," the central theme of its case, and repeatedly used it as a proxy for the ultimate issue of guilt. But this statement was inadmissible hearsay, and the military judge's characterization of it as an "excited utterance," completely unaccompanied by findings of fact or analysis on the record, was a clear abuse of discretion.

Meanwhile, the competent evidence presented was limited to (1) direct evidence of innocence (Amn Smith's statements) and (2) corroborating evidence of

innocence (SrA H.S.'s testimony). While the Government undeniably had evidence of intoxication, that is not the legal standard. The legal standard is incapacitation. And the evidence consistently showed that SrA H.S. could consent, did consent, and that Amn Smith believed she consented. This evidence was legally insufficient.

WHEREFORE, this Honorable Court should reverse the Air Force Court's decision and set aside the findings and the sentence.

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I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Appellate Division on November 21, 2022.

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